

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREW E. ROTH,

Plaintiff,

– v. –

MACELLUM OPPORTUNITY FUND LP,
MACELLUM MANAGEMENT LP,
MACELLUM ADVISORS GP, LLC, ANCORA
MERLIN INSTITUTIONAL LP, ANCORA
MERLIN LP, ANCORA CATALYST
INSTITUTIONAL LP, ANOCRA CATALYST
LP, ANCORA CATALYST SPV I LP, ANCORA
CATALYST SPV I SPC LTD, ANCORA
ADVISORS LLC, JONATHAN DUSKIN,
FREDERICK DiSANTO,

Defendants.

and

BIG LOTS, INC.

Nominal Defendant.

20 Civ. 9176

(Jury Trial Demanded)

COMPLAINT

Plaintiff Andrew E. Roth (“Roth”) by his undersigned attorneys, alleges upon information and belief as to all paragraphs except paragraph 1, as follows:

1. Plaintiff Roth is a New York resident who is the owner of common stock of Big Lots, Inc. (“Big Lots” or “the Company”).
2. Big Lots, a nominal defendant herein, is an Ohio corporation with its principal place of business at 4900 E. Dublin-Granville Road, Columbus, Ohio 43081.

3. Defendant Macellum Opportunity Fund LP (“MO”) is a Delaware limited partnership with its principal place of business at 99 Hudson Street, 5th Floor, New York, New York 10013.

4. Defendant Macellum Management LP (“MM”) is a Delaware limited partnership with its principal place of business at 99 Hudson Street, 5th Floor, New York, New York 10013.

5. Defendant Macellum Advisors GP, LLC (“MA”) is a Delaware limited liability company with its principal place of business at 99 Hudson Street, 5th Floor, New York, New York 10013.

6. Defendant Ancora Merlin Institutional LP (“AMI”) is a Delaware limited partnership with its principal place of business at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124.

7. Defendant Ancora Merlin LP (“AM”) is a Delaware limited partnership with its principal place of business at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124.

8. Defendant Ancora Catalyst Institutional LP (“ACI”) is a Delaware limited partnership with its principal place of business at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124.

9. Defendant Ancora Catalyst LP (“AC”) is a Delaware limited partnership with its principal place of business at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124.

10. Defendant Ancora Catalyst SPV I LP (“AC-SPV”) is a Delaware limited partnership with its principal place of business at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124.

11. Defendant Ancora Catalyst SPV I SPC Ltd (“AC-SPC”) is a Cayman Islands segregated portfolio company with a business address at 94 Solaris Avenue, P.O. Box 1348, Camana Bay, Grand Cayman E9 KY1-1108, Cayman Islands.

12. Defendant Ancora Advisors LLC (“AA”) is a Nevada limited liability company with its principal place of business at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124.

13. Defendant Jonathan Duskin (“Duskin”) is an individual with a business address at 99 Hudson Street, 5th Floor, New York, New York 10013. Duskin is the Chief Executive Officer of Macellum Capital Management LLC and sole member of MA.

14. Defendant Frederick DiSanto (“DiSanto”) is an individual with a business address at 6060 Parkland Boulevard, Suite 200, Cleveland, Ohio 44124. DiSanto is the Chairman and Chief Executive Officer of AA, a registered investment adviser to AMI, AM, ACI, AC, ACS, and AMI.

JURISDICTION AND VENUE

15. This action is brought on behalf of Big Lots pursuant to Section 16(b) of the Securities Exchange Act of 1934 (“the Exchange Act”), 15 U.S.C. § 78p (“§16(b)”), to obtain disgorgement of profits obtained by defendants in violation of that statute. Jurisdiction of this court and venue in this District are proper pursuant to 15 U.S.C. § 78(a)(a) in that certain of the acts underlying this action occurred in this District.

THE GOVERNING LAW

16. Section 16(b) of the Exchange Act provides that if a person, while beneficially owning more than 10 percent of a class of equity securities of an issuer, purchases and sells, or sells and purchases shares of any equity security of such issuer within a period of less than six

months, any profits arising from those transactions are recoverable by the issuer or by a shareholder suing on its behalf.

SECTION 16(b) GROUP ACTIVITY

17. Under SEC Rule 16a-1(a)(1) promulgated under the Exchange Act, where two or more persons “act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding or disposing of securities of an issuer” as set forth in Section 13(d)(3) of the Exchange Act (“§13(d)”), such persons are deemed to be a “group” for purposes of determining §16(b) liability. Under SEC Rule 16a-1, the shares held by persons in such a group are aggregated to determine whether the group has a greater than 10% beneficial ownership in the issuing corporation. If the aggregate number of shares beneficially owned by the group exceeds 10%, each member of the group is deemed to be a greater than 10% beneficial owner and is liable to disgorge profits arising from transactions by such group member effected within a less than six-month period.

18. On or about January 31, 2020, each of the defendants (other than nominal defendant Big Lots) entered into a written “Group Agreement” to form a section 13(d) group “for the purpose of working together to enhance stockholder value”. The defendants are hereinafter collectively referred to as the “Macellum/Ancora Group”). Thus, the shares of each of these group members is aggregated to determine insider status.

DEFENDANTS’ PURCHASE AND SALE TRANSACTIONS

19. A review of the Macellum/Ancora Group’s Schedule 13D filed on March 6, 2020, the Macellum/Ancora Group’s Amendment No. 2 to Schedule 13D filed on April 16, 2020, SEC Form 4’s filed by members of the group on April 13, 2020 and April 15, 2020, and

filings by the Company, show that the group likely garnered short-swing profits which are subject to disgorgement.

20. In these filings, the group reported purchases of the Company's common stock on March 4, 2020 which occurred while the group was a greater than 10% beneficial owner of the Company's outstanding common stock. Upon information and belief, the group purchased as many as 413,454 shares while the group was a greater than 10% beneficial owner, but the precise number is unknown because the group violated its obligations under Section 16(a) of the Exchange Act by not reporting these purchases.

21. Thereafter, on April 9, 2020, April 13, 2020 and April 14, 2020, the group purchased put options and sold call options (constituting sale transactions) while the group remained a greater than 10% beneficial owner. Upon information and belief, the group realized disgorgeable short-swing profits of approximately \$800,000 based on the difference between the trading prices of Big Lots common stock on March 4, 2020, when the matchable purchases occurred, and on April 9, 13 and 14, 2020, when the matchable deemed sales occurred. See SEC Rule 16b-6(c). The precise amount of these profits is unknown because the group violated its obligations under Section 16(a) of the Exchange Act by not reporting its March 4, 2020 purchases.

ALLEGATIONS AS TO DEMAND

22. By letter dated July 15, 2020 ("the July 15 letter"), Plaintiff made demand on the Board of Directors of the Company to commence this lawsuit based on the facts alleged above.

23. On September 16, 2020 a letter requesting a response together with a copy of the July 15 letter was sent by the Plaintiff to the Board of Directors.

24. The Board of Directors never responded to Plaintiff's demand.

AS AND FOR A FIRST CLAIM FOR RELIEF

25. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 24, *supra*, as if fully set forth herein.

26. As particularized in paragraphs 18-21, *supra*, the Macellum/Ancora Group engaged in purchase and sale transactions in the Company's common stock and put and call options which resulted in disgorgeable short-swing profits.

27. Plaintiff is unable to precisely calculate the group's short-swing profits from such transactions, but it is believed that short-swing profits subject to disgorgement to Big Lots are in excess of \$800,000.

WHEREFORE, plaintiff demands judgment on behalf of Big Lots against defendants, as described above, plus attorneys' fees, interest and such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 2, 2020

Yours, etc.

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& BROITMAN P.C.

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